

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-3564

United States of America,

Plaintiff - Appellee,

v.

David McElroy,

Defendant - Appellant.

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Appeal from the United States
District Court for the
Western District of Missouri.

[UNPUBLISHED]

Submitted: April 11, 2005

Filed: April 18, 2005

Before MURPHY, BRIGHT, and MELLOY.

PER CURIAM.

David McElroy pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). At sentencing McElroy objected to the finding of the district court¹ that his prior convictions for incest and sodomy were violent felonies within the meaning of 18 U.S.C. § 924(e), but he did not contest the fact that he had been convicted of these crimes. He was sentenced to the mandatory minimum of 180 months provided in § 924(e) because he had three previous convictions for a violent felony or serious drug offense, and he does not

¹The Honorable Richard E. Dorr, United States District Judge for the Western District of Missouri.

contest that his prior convictions for first degree attempted burglary and production of a controlled substance qualified.

McElroy argues that the district court erred by finding that his prior state court convictions for sodomy and incest were violent felonies instead of submitting the question to a jury to be decided beyond a reasonable doubt, citing Blakely v. Washington, 124 S. Ct. 2531 (2004). He contends that Blakely and Apprendi v. New Jersey, 530 U.S. 466 (2000), have undermined the validity of Almendarez-Torres v. United States, 523 U.S. 224 (1998). The government responds that McElroy does not contest the fact and validity of his state court convictions and that whether an offense is a violent felony is a question of law and does not require a jury trial.

In Almendarez-Torres, the Supreme Court held that a prior felony conviction is a sentencing factor for the court rather than a fact issue for the jury. That principle has been reaffirmed most recently in United States v. Booker, 125 S. Ct. 738, 756 (2005). See also Blakely, 124 S. Ct. at 2536; Apprendi, 530 U.S. at 490. The Supreme Court has not reconsidered its decision in Almendarez-Torres, see Shepard v. United States, 125 S. Ct. 1254, 1264 (2005) (Thomas, J., concurring), and it remains binding on this court. We conclude that the district court did not err by applying the mandatory minimum sentence based on McElroy's prior state convictions for incest and sodomy.

We accordingly affirm the judgment of the district court.
